

Memorandum August 10, 2004  
From: W.J. Srstka, Jr., Circuit Judge  
To: Lawyers and interested parties  
Re: Changes to collection procedures  
Effective: October 1, 2004

At a meeting on April 21, 2004, members of the bar and other interested parties met with me and Judge Severson to discuss some changes in default judgment procedures and forms. One significant change we discussed was the amendment to SDCL 15-6-54(d), that takes effect on July 1, 2004. The amendment provides for a new, discretionary procedure for taxing costs at the time of judgment, by prior motion and application, eliminating the 10-day waiting period for objections after judgment. However, in order to give due process notice to the other party, the Motion, Affidavit for Default Judgment, and application for taxation of disbursements should be served on the opposing party, giving that party time to respond. Alternatively, if the application for taxation is not included with the Motion and the moving party just takes a Default Judgment after 30 days with no answer, the “old” procedure applies, i.e., with taxation of disbursements post-judgment after 10 days notice.

Also discussed were situations in which a party requests attorney fees, but it is not obvious that the party is a regulated lender or the assignee of a regulated lender. We decided that if a plaintiff is a regulated lender or its assignee, this fact should be alleged **in the Complaint**, and not just in the Affidavit (because the attorney can’t testify as to the factual question). If the plaintiff is a regulated lender or its assignee, that should **also be disclosed on the cover sheet, with the type of lender or assignment specified.**

The third matter discussed was the proper interest rate. The Court will not require any additional showing if a party is seeking the 10% open account interest rate on the judgment. An additional showing will be required if the party is seeking a contract rate other than the 10% open account rate.

Finally, under the “old” procedure, we discussed combining the Affidavit of Default, Motion for Default and Application for taxation of disbursements all in one document with court approval of disbursements in the judgment, obviating the need for a separate affidavit and separate approval for disbursements as per current forms #1 and #5. Alternate forms that combine and simplify this process are attached as 2<sup>nd</sup> Circuit Default Judgment **Form #9alt., July 2004).**

I request that you notify other collection agencies out of the Second Circuit of the changes.

The following summary of changes in procedure must be followed.

1. The amendment to SDCL 15-6-54 (d), which takes effect on July 1, 2004, no longer requires separate taxation of disbursements after a default judgment, if an application for taxation is included with a motion for default judgment.
2. The law still requires judicial approval of prejudgment interest and notice of taxation of disbursements, with due process notice to the defendant (either before, under the new procedure, or after judgment, under the old procedure).
3. **“New” Procedure:** In order to take advantage of the amendment to SDCL 15-6-54 (d), the application for taxation of disbursements and prejudgment interest must be included in the Motion for Default and Supporting Affidavit. New **Forms #7** – (Cover Sheet), and **#8** – (Motion for Default, Application for Taxation of Costs & Notice with Affidavit) should be used in that instance.
4. **“Old” Procedure:** If a party is not filing a Motion for Default, but is simply applying for Judgment after 30 days with no answer, taxation of disbursements should be made separately after judgment using existing Forms #1 through #5, and **#6A** (Cover Sheet – A), **or** **#6A** (Cover Sheet-A) and **Form #9alt.** (That is, Form #9 alt. may be used as an alternative to forms #1 and #5 under the old taxation procedure).
5. The law limits prejudgment interest on open accounts to ten percent. An additional showing will only be required if a party is seeking a contract rate other than ten percent.
6. Only suits by regulated lenders or its assignee may recover attorney fees, upon separate showing, judicial approval and proper taxation, although this may also be included in a Motion for Default with Supporting Affidavits, in the same manner as prejudgment interest and taxation of disbursements.
7. There has been some confusion when it is not obvious from the caption that a Plaintiff is a regulated lender or its assignee. That fact should be pled **in the Complaint**. An attorney’s Affidavit is not sufficient because an attorney cannot testify to a fact. The Cover Sheets (Forms #6 – #A and #7- #B) now include a place to indicate whether a Plaintiff is a regulated lender or assignee and what type.

Attached are a complete set of the 2<sup>nd</sup> Circuit Default Judgment Forms, including the following: previous **forms #1 through #5**; new **form #6A** (Cover Sheet A, modified to provide information on a regulated lender); and new **form #7** (Cover Sheet B), new **form #8** (Motion for Default, Application for Taxation of Costs & Notice with Supporting Affidavit), and new **form #9alt.** With the exception of the appropriate Cover Sheet, the forms are directory and not mandatory; however, something similar must be used.